

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1220 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

SURESH RANCHOD DHODIA

Versus

STATE OF GUJARAT

Appearance:

MR TS NANAVATI for Petitioners

MR SP DAVE, A.P.P. for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 05/03/98

ORAL JUDGEMENT

1. The three appellants herein then aged 23, 22 and 29 years faced charge of committing gang rape under section 376 read with section 114 of the Indian Penal Code (for short 'IPC') in Sessions Case No.43 of 1985 before the learned Sessions Judge, Valsad at Navsari. They also faced charge of causing simple hurt, under section 323 read with section 114 of the IPC. They having pleaded not guilty to the charge, were tried before the learned Sessions Judge. Their defence was

that of denial of the charge while stating before the Court that their names were given merely on suspicion. After hearing the learned advocate appearing for them as also the learned Public Prosecutor, by his impugned judgment and order dated 26th August, 1986, the learned Sessions Judge convicted them of offence punishable under section 376 as also under section 323 read with section 114 of the IPC, and sentenced them to suffer rigorous imprisonment of three years. The learned Sessions Judge has assigned cogent and special reasons for awarding less than the minimum sentence prescribed under the aforesaid provisions of the IPC. The appellants have challenged their conviction and sentence before this Court in this appeal.

2. The prosecution case, as has been narrated in the impugned judgment, is that the prosecutrix Bai Pali had gone to attend some marriage occasion at village Saran situated near Udwada. She was accompanied with her cousin Purshottam, and Subhash with whom she was engaged. When they were returning from Udwada to their village Belparva they were walking down the distance from Udwada and proceeding towards National Highway No.8 on which Rohit Paper Mill is located. When they reached near Trimurti Farm, all the three appellants, hereinafter referred to as the accused, came from behind, assaulted Subhash and Purshottam and drove them away by beating them, lifted Bai Pali and taken her to some open ground on the side of the road. There, all the three accused committed gang rape on Bai Pali. In the process, Bai Pali got injuries and abrasions on her thigh, knee and ankle.

3. It is the prosecution case that soon after the incident Purshottam and Subhash rushed to main door of Rohit Mill and informed the watchman about the girl having been taken away and managed to send the information in the police station through Security Officer, Mr. Jadeja. As the Police required them to go to the police station while also making arrangement for a vehicle Mr. Jadeja had taken a jeep of the Rohit Mill and they reached Pardi Police Station and in the company of head constable Ishwar Singh they all went for inquiring about the girl.

4. On the other hand, the prosecutrix Bai Pali having come to senses at about 4 o'clock early in the morning put on the torn clothes and returned home and after having informed about the incident she had an occasion to give complaint Ex.9 against the three accused persons whom she knew from before the incident. Her

clothes were seized under the panchnama. She was also examined under panchnama. She had been medically examined and statements of witnesses were recorded. After receipt of the reports from the concerned authorities, the accused persons were chargesheeted and ultimately tried, as stated above.

5. The prosecution has examined following witnesses:

- (i) Prosecutrix, Paliben, PW-1, Ex.8.
- (ii) Purshottam Chunilal, PW-2, Ex.10.
- (iii) Subhash Jairam, PW-3, Ex.11.
- (iv) Jagubhai Budhabhai (father of prosecutrix), PW-4, Ex.12.
- (v) Himmatsingh Bahadursingh Jadeja, PW-5, Ex.13.
- (vi) Virendra Ramanand Pandey, PW-6, Ex.14.
- (vii) Bhikhaji Kashiram, PW-7, Ex.16.
- (viii) Bhagwansinh Ratansinh, PW-8, Ex.18, and
- (ix) Ishwarsingh Vajesingh, PW-9, Ex.19.

Ex.24 is the panchnama of the scene of offence from where broken bangle pieces were found.

Ex.25 is the panchnama of Bai Pali's clothes.

Ex.26 and 27 are the panchnames of the person of the accused.

6. They all appear to have been received in evidence with the consent on behalf of the accused persons. The medical certificate with regard to the examination of Bai Pali is placed on record at Ex.15 and Dr. Virendra Ramanand Pandey, PW-6, Ex.14 has been examined in respect of this certificate. The list of muddammal articles in the form of prosecutrix's bangles with broken pieces, the skirt with broken hooks, the underwear with torn right side sleeve have been placed on record at Ex.7. The first telephonic message noted at the Pardi Police Station at about 10-30 at night on 16th April, 1985 has been placed on record at Ex.17. The complaint which has been given by Bai Pali at the Pardi Police Station at about 9-45 a.m. on 17th April, 1985 appears at Ex.9.

7. There has been a debate over the evidence of the prosecutrix, Bai Pali, both before the trial court as well as before this Court. In my opinion also, her evidence assumes a great deal of importance. While dealing with the present appeal, it would therefore be appropriate to set out what she has deposed before the Court. She has stated her age to be 17 years. She has been living with her parents at village Belparva. She has an elder sister Vanita and two younger brothers. She

has not studied. She had been attending to the labour work at the farm of Dhedka Mittal. From there she had been going to throw out the rubbish in the Rohit Paper Mill. The place known as Khadki Pole is on that way. At that place, the accused No.2 runs his tea stall in a four wheeler. Accused No.1 and 3 used to remain in the company of accused No.2 at the tea stall. She knew them on account of making of gestures by them when she used to pass by that place (as deposed by her in the cross-examination). She knew them since she used to pass by that place on account of her aforesaid occupation. The incident in question occurred about one year before the date of her evidence (it is not in dispute that the incident is stated to have occurred on 16th April, 1985). She was engaged with Subhash Jairam of Dungri at that point of time. On the day of incident, Subhash had gone to take her for attending the marriage at village Saran. Accordingly, she in the company of her uncle's son, Purshottam, and Subhash went to village Saran. They returned to Udwada at about 6 o' clock in the evening and started walking down the distance for their village Belparva. On their way, she had seen the three accused persons when they reached near Rohit Paper Mill. The accused No.1 Suresh caught hold of her and pressed her mouth, accused No.2 caught hold of her hands and accused No.3 caught hold of her legs. All the three accused accordingly lifted her and had taken her to some place. She was taken to some open ground, fell and forced her being laid on the ground. At that time she had worn underwear and skirt. The accused No.1 had torn of her underwear and launched sexual assault on her. After he had the sexual act with her, accordingly the accused No.2 and thereafter the accused No.3 also had the similar acts with her. Her skirt also got torn off. She had injuries on her legs and on her face. She was also hurt on her back. She was slapped on her face. She was also hurt on her secret part. The accused persons escaped after committing the sexual acts as aforesaid, as a result of which she was left unconscious. When she came to senses she found herself nearly naked, her clothes lying by her side. Her bangles were broken, which were of blue colour. According to her say, when they were going home and when she was lifted, Subhash and Purshottam were also assaulted and beaten. After having come to senses, she put on her clothes and went home. There were blood stains on her underwear. She reported the incident to her father and gave her complaint in the morning on the next day (Ex.9). She was thereafter sent to Government hospital at Pardi. Her clothes were attached. She was then shown the muddammal article No.1 in the form of bangles with broken parts thereof and she identified the

same to be the same which she had put on at the time of the incident. She also identified the muddammal articles No.2 and 3 respectively, the skirt and the underwear, and she identified the said articles also.

8. In her cross-examination, the prosecutrix has admitted that the workers come out of the Rohit Mill at around 6 o' clock in the evening and that some people also stand waiting at the bus stop near Rohit Paper Mill. She admitted that there were some people standing at the bus stop when she in the company of Purshottam and Subhash reached near the mill. She also saw some persons riding their cycles. She admitted that the accused persons had lifted her at a place nearby the Rohit Mill and she was taken to the ground situated on the eastern side of the road. She however deposed that her eyes were pressed by the accused and therefore she was not able to see. She had shouted at the time when she was lifted but at that time there were no persons. She did not know how far she was taken nearby the Trimurti farm. She did not know to whom the farm belonged. She has admitted that there are residential houses on the eastern side of the mill as also at the place beyond the mill. According to her, the place of incident where she was taken by the accused persons must be around 15 to 20 steps from Trimurti farm but that place was much far off from Rohit Mill. She admitted that she did not state in her complaint about she having been hurt on her face and back. According to her, the upper part of the skirt was not taken off. She deposed that she had bleeding on her secret part as a result of the sexual act committed by the accused. She had also pain in that part. She had difficulty in walking. She admitted that as far as she remembered she came to senses at about 5 o' clock early in the morning. She also deposed that she informed the Doctor about the pain in her secret part and about the injury on her thigh. She has then admitted that Mr. Balubhai happens to be her uncle and he has been serving in Police somewhere in Pardi Taluka. She did not know Mr. Jadeja, Security Officer of the Rohit Paper Mill. It must be around 6 o'clock in the morning when she reached home. According to her, the village must be at a distance of about 5 to 6 miles from the place of incident. When she reached home Mr. Balubhai was present. After about half an hour, they started for the police station. She was in the company of her father and her uncle. She deposed having dictated her complaint. She knew the names of the accused persons since they themselves were speaking their names at the time of making of gestures when she used to pass by the place where they were standing. She admitted that she did not

complain about the accused making gestures and teasing her.

9. It might be noted from the aforesaid evidence that she has described the incident as it occurred. It might also be noted from the aforesaid evidence that she neither had any prior concert or enmity with the accused persons except that she was being teased on occasions when she used to pass by the place where they were standing. She has also deposed about the manner in which the incident occurred. It would be important to note that the accused persons had followed the prosecutrix, who was in the company of her cousin and Subhash with whom she was engaged and with whom she was to be married. It also appears from the evidence of the prosecutrix that the accused persons had launched the assault from behind and in the process she was lifted by them. Finally it also appears from the evidence that when actually the incident occurred there were no persons who could have rescued them. The submissions which have been made from the evidence of the prosecutrix in the context of other pieces of evidence will soon be considered. Suffice it at this point of time to note that the prosecutrix has narrated the incident as it occurred, has narrated her sufferings at the hands of the accused, has narrated after what lapse of time she has been at home and she has narrated the condition in which she was placed. It has to be seen whether the story which she has spoken is imaginary as is sought to be submitted. In the alternative, it has to be seen whether, she has been for some unknown reason falsely implicating the accused persons. The most important pieces of evidence in this connection would be the medical certificate as submitted by Dr. Virendra Ramanand Pandey, PW-6, Ex.14 and the panchnamas Ex.24 and 25 coupled with the muddammal articles as noted in the list of such articles Ex.7. The medical certificate appearing at Ex.15 need be reproduced here.

Certified that Ku. Pali Jagu Patel, aged about 17 years of village Belparva, was brought to this dispensary with Police yadi from P.S. Pardi by P.C. Smt. Nirmalaben D. Patel No.969 for her examination & treat on 17-4-85 at 1-30 p.m.

Examined & found as under:-

1. Clothes :-

She did not come to the dispensary with the same clothes worn at the time of the occurrence of rape. She had worn fresh clothes at the time of examination.

2.

(i) Abrasion on back side of the right forearm.

(ii) Abrasions on right side of scapular region.

(injuries no.(i) & (ii) could be caused by ground floor contact)

(iii) Abrasions on both of the nostrils caused by nails of the fingers.

(iv) Abrasions on lateral side of the left thigh.

(v) Abrasions on lateral side of the right knee.

(vi) Abrasions on medial side on and below the right knee.

(injuries no. (iv) to (vi) could be caused by thorny grass and ground floor contact)

(vii) She complained that she had been slapped by Ramesh Sukar (Supadia) Patel on right side cheek. No external injury detected.

(viii) There were nothing in the nails like debris or mud etc.

(ix) She walks steadily.

3. The Genitals :-

(i) At the time of examination she did not complain of pain either in thighs or vagina.

(ii) She was having thin & dark hairs on the pubic region and the same were well clean. Semen or mark of semen was not present.

(iii) Hymen and walls of the uterus were normal. No Tear, No Scratches, No Swelling, No redness, No pain. No bleeding. The Hymen was intact. Vaginal Orifice - two fingers on slight pressor. Destruction does not taken place of the

Hymen.

- (iv) Collected vaginal secretion by introducing a plain sterile cottonwool swab in a phial for chemical examination.
- (v) She did not complain of burning in the uterus and she was having no sign of venereal infection.

4. Age of the Person:-

Her age as noted above is correct.

5. Age of injury :-

Age of injuries as noted above in column
2 must be about 18 hours.

6. Opinion:-

On the basis of above noted facts it cannot be said that a complete intercourse could have been committed violently.

Issued certificate to the P.S.I. Pardi and request to produce clothes of the person the same as that worn at the time of occurrence of rape.

10. The submissions flowing from the aforesaid certificate in respect of which Dr. Virendra Ramanand Pandey has testified might be considered a little later. However, the injuries noticed on the person of the prosecutrix, who was examined at about 1-30 in the afternoon on 17th April, 1985 speak for themselves. The third injury of abrasions of both of the nostrils caused by nails of the fingers would be a significant injury involving some person causing hurt to the prosecutrix.

11. The next piece of document that would assume importance is the panchnama, Ex.24, which is the panchnama of the scene of offence pointed out by the prosecutrix. This panchnama was made between 10 o'clock to 10-45 o'clock in the morning of 17th April, 1985. The National Highway is shown at a distance of 300 ft. on the western side of Highway Road No.8, and Trimurti temple is shown to be at a distance of 700 ft. from the western direction of the road. There is a road directed towards crematorium on the eastern direction at a

distance of about 20 ft. from the place of the incident. There is a Kothar Khadi at a distance of about 500 ft. on the southern direction and there is a place known as Jog Moti Falia at a distance of about half a kilometer on the northern direction. Seven pieces of broken bangles were found from the place of the incident and they were of blue colour. Comparing the colour of the broken pieces of the bangles, it has been noticed that the said colour was tallying with the colour of the bangles, which were put on by the prosecutrix on her hands. It has also been noticed that the prosecutrix identified the broken pieces, as the pieces of bangles which she had put on. The said broken pieces of bangles were attached. It has finally been noticed that the place of incident is a lonely place with no population there.

12. Ex.25 is the panchnama with regard to the examination of the person of the prosecutrix by the lady pancha as also the attachment of the underwear and the skirt, which were put on by the prosecutrix at the time of the incident and produced by her before the panchas. It has been noticed that there were abrasions caused by nails on thigh portion of both the legs, which is below the secret part. The underwear was found to be torn with the string thereof in a broken condition. The lower portion of the underwear was found to have been stained with liquid like semen. The skirt was found to have been torn from the waist portion at the place of hooks. The said articles were attached for further investigation.

13. From both the aforesaid panchnamas, it might be noticed that the story which the prosecutrix has narrated finds supported by the broken pieces of the bangles found from the scene of offence and the torn condition of the underwear and the skirt. The underwear was also noticed with the stained substance like semen. The injuries noticed from the person of the prosecutrix would also lend support to the story, which the prosecutrix has narrated. Thus it can hardly be argued that the evidence of the prosecutrix is devoid of any corroboration.

14. Coupled with the aforesaid documents her conduct of reporting her sufferings to her parents and then over to the police in the form of her complaint, Ex.9, would also lend support to what she has deposed in her evidence. Referring to Ex.17, Mr. Nanavaty, learned advocate for the accused argued that the telephonic message as appearing at Ex.17 ought to have been treated as the First Information Report and the complaint Ex.9 could not have been treated as the First Information Report. According to his submission this would adversely

affect the prosecution case. In reply, Mr. Dave, learned A.P.P. for the State supported the judgment of the trial court where it has been noticed that the information received and noted at Ex.17 was not such as could be said to be F.I.R.. According to his submission that is merely a cryptic message. That is merely the entry of telephonic message devoid of such details as would indicate all the necessary facts regarding commission of cognizable offence. The learned Sessions Judge has referred to the entry disclosing the fact that one girl had been taken away by two to three persons in the dark. That did not set out the name of the girl, the name of the informant and other particulars. That merely speaks about sending police protection. Under these circumstances, this telephonic message could not be treated as the F.I.R.. In my opinion, the conclusion reached by the learned Sessions Judge deserves to be accepted. Mr. Dave has supported the conclusion by making reference to the decision of the Hon'ble Supreme Court in the case of Somabhai vs. State of Gujarat reported in AIR 1975 SC 1453 (see para 18). It has been observed that under section 154 of the Code of Criminal Procedure the first information is the earliest report made to the police officer with a view to his taking action in the matter, and the type of message which was given in that case to the police could not be regarded as such first information as is referred to in section 154. Such a telephonic message has been described to be lacking necessary facts. In the present case also, the message appearing at Ex.17 is too cryptic to be treated as the first information. Hence, the submissions that the complaint Ex.9 could not be received in evidence as the first information report cannot be accepted.

15. It has been submitted from the aforesaid evidence of the prosecutrix while comparing the same with the evidence of other witnesses, Purshottam Chunilal and Subhash Jairam in particular, that there were two to three more persons than three accused persons who had taken away the prosecutrix. Now the prosecutrix does not make any reference with regard to any such other persons. It might be noted that the aforesaid two witnesses, Purshottam Chunilal and Subhash Jairam appeared to have made reference with regard to more persons than three accused persons but then they have stated about they having been assaulted, beaten and overpowered by such persons. If the situation is visualised in the context of the prosecutrix and the aforesaid two witnesses having been followed by three accused and other persons, the prosecution story becomes still more clear and simple because the prosecutrix does not make mention about the

other persons. It cannot be found that she is narrating some imaginary story or she is falsely implicating the three accused persons. It could have so happened that the other persons with the aid of one or more of three accused persons must have assaulted and beaten the two witnesses, Purshottam Chunilal and Subhash Jairam, simultaneously, facilitating the three accused persons in lifting away the prosecutrix from the place. At the same time, it has also been submitted that the two witnesses, namely, Purshottam and Subhash very hesitantly speak about the presence of the accused persons eventhough they were known to the two witnesses, more particularly, the witness Purshottam. It has therefore been submitted that there is a possibility of implicating the three known persons when during the total dark evening none of the witnesses could spot out the persons who had assaulted all the three witnesses. Here also it might be noted that the prosecutrix had sufficient time and had been the victim of the subsequent heinous assault and acts on the part of the accused so as to identify them as having been the persons whom she knew from before. Therefore, the prosecution story as it flows from the prosecutrix and even from the evidence of the witnesses, Purshottam and Subhash would become more natural. It might be noted that if evidence of Purshottam and Subhash is examined in isolation the facts stated by them might appear to be strange because of incomplete narration or because of such narration as would be directly relatable to them. However, if the facts as testified by all the three witnesses are examined in totality, the picture would become clear, as stated above.

16. It has then been submitted that the evidence which the prosecutrix has given would sound not natural if the same is examined in the light of medical evidence given by Dr. Virendra Ramanand Pandey, PW-6, Ex.14. It is nodoubt true that while speaking to the injuries which the Doctor had noted from the person of the prosecutrix, he has also deposed that he could not find any mark of semen in the pubic region, or any of the secret parts of the prosecutrix. It is nodoubt true that the witness has noticed hymen of the prosecutrix intact without there being any tear or destruction and that he also found the walls of uterus to be normal. He found that there were no scratches, no swelling, no redness, no pain, no bleeding, no burning or no sign of venereal infection, on his examination of the prosecutrix. According to his opinion, the external injuries must have been caused within 18 hours of his examining the prosecutrix. He has opined that it could not be said that there was a complete intercourse committed violently. He has further

deposed that there was a possibility of penetration of the male organ into the secret female organ but it was not possible to give certain opinion. It has been submitted from this evidence of the medical witness that the prosecution has failed to establish the commission of rape by three accused upon the prosecutrix. While dealing with this submission, the injuries noticed from the person of the prosecutrix by the aforesaid medical witness should be borne in mind. It has also to be borne in mind that the prosecutrix has been examined after around 13 to 14 hours of the prosecutrix having been subjected to the sexual assault as aforesaid. There is no question asked to the medical witness about what would have been the effect of passage of time on the genital organ/s when during the course of sexual assault and commission of sexual act, complete intercourse could not be had. There might be number of circumstances and causes intervening during the violent sexual assault for complete intercourse not resulting to the prosecutrix. As can be seen from explanation to section 375 of the IPC, which defines 'rape', penetration would be sufficient to constitute the sexual intercourse necessary to the offence of rape. The evidence of prosecutrix as supported by the aforesaid pieces of evidence and circumstances clearly establish the sexual intercourse by the three accused persons and it would be immaterial if the intercourse was incomplete for the reasons that could not be placed on record. It would be sufficient that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little. It would be sufficient to show that the private parts of the accused persons entered into the person of the woman. It is also not essential that hymen should be ruptured provided it is clearly established that there was penetration though partial. Reference in this connection has been made by the learned A.P.P. to a couple of decisions of the Apex Court.

17. In Prithi Chand vs. State of H.P. reported in AIR 1989 SC 702, it has been observed that the absence of spermatozoa cannot cast a doubt on the correctness of the prosecution case.

18. In Pramod Mahto vs. State of Bihar reported in AIR 1989 SC 1475, it has been observed that it is not necessary for the prosecution to adduce clinching proof of a completed act of rape by each one of the accused on the victim in order to find the accused guilty of gang rape.

19. In State of Maharashtra vs. Chandraprakash

Kewalchand Jain reported in AIR 1990 SC 658, one of the reasons for not accepting the prosecution case was that the find of semen-stains on the 'salwar' and 'kurta' of the prosecutrix ran counter to her evidence that on both the occasions she was completely denuded before she was ravished. Dealing with this reason given by the High Court, the Apex Court observed in para-25 as under:

25. It is true that the prosecutrix had deposed that on both the occasions she was completely denuded before the respondent raped her. On the first occasion he had removed her 'kurta' before she was laid on the cot. Her 'salwar' was removed while she was lying on the cot. Therefore, the 'salwar' may be lying on the cot itself when the act was committed. It is, therefore, not at all surprising to find semen stains on the 'salwar'. She was wearing the same clothes when she was ravished the second time. On the second occasion he first threw her on the cot and then undressed her. Therefore, both the 'kurta' and the 'salwar' may be lying on the cot at the time of sexual intercourse. Besides she had worn the same clothes without washing herself immediately after the act on each occasion. It is, therefore, quite possible that her clothes were stained with semen. It must also be remembered that this is not a case where the prosecuting agency can be charged of having concocted evidence since the respondent is a member of their own force. If at all the investigating agency would try to help the respondent. There is, therefore, nothing surprising that both these garments bore semen stains. Besides, there was no time or occasion to manipulate semen stains on her clothes and that too of the respondent's group. Her clothes were sent along with the other articles attached from Room No.36 for chemical analysis under the requisition Ex.67. The report of the Assistant Chemical Analyser, Ex.69 shows that her clothes were stained with human blood and semen. The semen found on one of her garments and on the bed sheet attached from the room was of group A which is the group of the respondent, vide Ex.70. Of course the other articles, viz. the mattress and the underwear of the respondent bore no stains. On the contrary the find of semen lends corroboration, if corroboration is at all needed to the version of the prosecutrix. The possibility of the semen stains being of Mohmad

Shafi is ruled out as his group was found to be 'B' and not 'A'. In the circumstances the absence of semen or spermatozoa in the vaginal smear and slides, vide report Ex.71 cannot cast doubts on the creditworthiness of the prosecutrix. The evidence of PW 3 Dr. Vijaya Lele shows that she had taken the vaginal smear and the slides on 23rd August, 1981 at about 1.30 p.m. i.e., almost after 24 hours. The witness says that spermatozoa can be found if the woman is examined within 12 hours after intercourse, thereafter they may be found between 48 and 72 hours but in dead form. Shamimbanu may have washed herself by then. Therefore absence of spermatozoa cannot discredit her evidence.

20. Finally, recalling the observations of the Apex court in Bharwada Bhoginbhai Hirjibhai (AIR 1983 SC 753) (Para 9), the Apex Court in Chandraprakash Kewalchand Jain's case has held that a prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. She is undoubtedly a competent witness under section 118 of the Evidence Act and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence. The observations which have been recalled from Bharwada Bhoginbhai Hirjibhai's case may now by reproduced:

"In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyse the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination.

And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the Western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the Western world. It is wholly unnecessary to import the said concept on a turn-key basis and to transplate it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian Society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical."

21. In Balwant Singh vs. State of Punjab (AIR 1987 SC 1080) it has been observed that it cannot be said that whenever resistance is offered there must be some injury on the body of the victim. In the present case, the injuries are noticed by the medical witness, Dr. Virendra Ramanand Pandey, as noted hereinabove. In view of the above, the submissions that the medical evidence does not lend support to the evidence of the prosecutrix cannot be accepted. On the contrary, on the vital parts of the prosecution story, the aforesaid medical evidence does lend corroboration.

22. It has next been submitted that the story with regard to the timings of the incident in question appearing in the oral evidence of the witnesses would throw doubt about the prosecution case. For this purpose, the oral evidence of the prosecutrix, Purshottam Chunilal and Santosh Jairam as also the evidence of Himmatsingh Bahadursingh Jadeja might be referred to.

23. The prosecutrix in her oral testimony Ex.8 has referred to the timings in the manner indicated hereinabove. PW-2, Purshottam Chunilal Ex.10 has deposed that some persons came, lifted the girl and some persons had beaten him. Since it was dark in the night, he could not spot out the number of persons who had taken away the girl. He was injured in his stomach on account of fist blow. He therefore ran away. Since Subhash was also beaten he also ran away. It was around 8 o'clock at night when the incident of taking away the girl had occurred. PW-3, Subhash Jairam Ex.11 has been declared

hostile as he did not support the prosecution case. Even then he has deposed in his examination-in-chief that there were six to seven persons who assaulted from behind. He was caught and Bai Pali was taken away. It was dark. Purshottam had run away. After he was released he went to Rohit Mill. It would be interesting to note that this witness withdrew from his promise of marrying with prosecutrix Bai Pali. PW-5 Himmatsingh Bahadursingh Jadeja, Ex.13, has deposed that he was serving as Security Supervisor in Rohit Paper Mill at the relevant point of time. The watchman of the mill contacted him at his residence at about 10 o'clock at night on 16th April, 1985 and informed him about the girl having been taken away. So he went to the gate of the mill where two boys informed him about the girl who was with them and who was taken away by five to six persons since they wanted to inform the police on phone. He saw to the police being informed accordingly on phone. From the evidence so stated it has been submitted that the prosecutrix has deposed about the evening hours soon after 6 o'clock whereas the other witnesses speak about dark hours at about 8 o'clock at night. In my opinion, there is not much of contradiction with regard to timings stated by the aforesaid witnesses. The prosecutrix was deposing about how she in the company of Purshottam and Subhash had started walking down the distance after they reached Udwada at around 6 o'clock in the evening. It is possible that all the three might have reached to the place of incident at around 8 o'clock at night. The fact remains that the prosecutrix had ample opportunity of spotting out the accused persons and simply because the other two witnesses did not spot the persons who had assaulted them from behind, it cannot be assumed that the prosecutrix was incorrectly or wrongfully identifying the three accused persons. It also cannot be assumed that the timings set out by the prosecutrix were so incorrect as to draw an inference that the story which she has stated is not believable. As stated above, the story which she has stated finds support from number of circumstances flowing from the evidence which has been discussed hereinabove.

24. From the evidence of the aforesaid two witnesses, namely, Purshottam and Subhash, it has been submitted that the conviction of the accused persons under section 323 of the IPC could not have been rendered. It might be noted that the accused persons have been convicted for the offence punishable under section 323 read with section 114 of the IPC. Both the aforesaid witnesses have testified with regard to they having been assaulted and beaten. Therefore, the conviction of the accused

persons under the aforesaid provisions cannot be faulted.

25. It has then been submitted that although there is no suggestion of consent on the part of the prosecutrix in the evidence of the witnesses more particularly, Bai Pali, the prosecutrix, the circumstances which flow from the medical evidence as well as from the evidence of prosecutrix would indicate that the probability of consent on the part of the prosecutrix for the alleged sexual acts cannot be ruled out. This submission deserves to be rejected at the threshold. It might be noted that the whole prosecution story revolves round the aggression first launched, the aggression that followed thereafter and the aggression which can be visualised not only from Bai Pali's evidence but also from the injuries on the person of Bai Pali as stated hereinabove. In that view of the matter, this submission made by Mr. Nanavaty cannot be accepted.

26. It has finally been submitted that if semen was found on the underwear as per the aforesaid scientific evidence, the prosecution story regarding removal of the underwear and commission of rape by all the three accused would become doubtful. If the observations reproduced hereinabove from the decision of State of Maharashtra vs. Chandra Prakash Jain (supra) (para-25) are borne in mind, the submission which has been made by Mr. Nanavaty from the find of semen on the underwear of the prosecutrix will not stand for a moment. Even otherwise there might be number of reasons for appearance of semen stains on the underwear of the prosecutrix. As stated above, merely that circumstance will not go to indicate that there was no penetration and therefore the offence was only one of indecent assault as contemplated by section 354 of the IPC.

27. In view of what is stated above and in the facts and circumstances of the case, this appeal deserves to be rejected.

NOW WITH REGARD TO SENTENCE :

28. On being asked, Mr. S.P. Dave, learned A.P.P. for the State has submitted that there has been no appeal by the State against the sentence or in respect of enhancement of sentence. He also submitted that the accused are not under a notice with regard to sentence or enhancement of sentence. Hence I do not propose to touch the question of sentence.

29. In the result, this appeal is dismissed. The

accused persons (appellants herein) shall surrender to
their bail on or before 27th March, 1998.

zgs/-